IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 391 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

NANUJI MOTIJI THAKAOR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 391 of 1998

MR AR SHAIKH for Petitioner No. 1-2

MR ANIL S DAVE for Petitioner No. 1

MR BY MANKAD APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA

Date of decision: 08/08/2001

ORAL JUDGEMENT

#. The appellants-accused have challenged in this appeal the judgment and order of conviction and sentence dated

22.4.1998 passed by the learned Sessions Judge, Banaskantha, Palanpur in sessions Case No.32 of 1989 whereby both the appellants-accused are found guilty for the offences under Sections 376, 354, 323, 324 IPC and sentenced to suffer 7 years R.I., 1 year R.I., 6 months R.I. for accused No.2 for the offences under Section 323 and 1 year R.I. for accused No.1 for the offence under Section 324 IPC.

#. Learned APP Mr.Mankad has produced jail record of the appellant-accused Nanuji Motiji Thakor. According to it, he has in all undergone sentence of 4 years 4 months 4 days as on 27.7.2001. Today, we are on 8.8.2001, thus, 12 days more are to be added. Thus, he has undergone 4 years 4 months 16 days. No separate jail record of appellant No.2 Fatuji is produced, but it is stated at the Bar that he was also not enlarged on bail, therefore, he has also undergone sentence of nearly 4 years and 5 months like the appellant-accused No.1.

#. Learned counsel Shri Dave for the appellants-accused straightaway conceded the order of conviction passed by the learned Judge against the appellant No.2-Fatuji. On the point of rape there was no cross-examination at all of the prosecutrix Kamruba. Her evidence regarding rape committed by the appellant-accused No.2 has to be accepted without any hesitation. If at all any corroboration is required, then it was there in the form of medical evidence. Once the conviction of the appellant-accused for the major offence under Section 376 IPC is confirmed, then there is no question of interfering with the order of sentence of 7 years R.I. imposed by the Trial Judge against the appellant No.2. Thus, the appeal qua the accused-appellant No.2 is required to be dismissed.

#. However, learned counsel Shri Dave for the appellants-accused has vehemently submitted that the learned Judge was absolutely wrong in convicting the accused No.1 Nanuji Motiji Thakor for the major offence under Section 376 IPC read with Section 34 IPC on the ground that when the prosecutrix Kamruba stated in her evidence that the accused No.2 committed rape on her with the common intention shared by the accused appellant No.1, then the accused No.1 has to be convicted for the offence under Section 376 IPC read with Section 34 IPC. I have carefully gone through the evidence of prosecutrix Kamruba PW-4 Ex.17, nowhere she has stated in her evidence that there was a common intention to rape her was shared by appellant No.1. Except that accused appellant No.1 Nanuji and accused No.2 Fatuji beaten her

before the rape was committed by accused No.2 nothing is stated against the accused appellant No.1. On the evidence led by the prosecution in this case it is difficult to arrive at the conclusion that there was a common intention to commit rape on her shared by both the appellants-accused. Nowhere, the Prosecutrix stated that the appellant-accused No.1 has committed rape on her. In this view of the matter the accused No.1 cannot be convicted for the offence under section 376 read with Section 34 IPC.

#. In view of the above discussion, the order of conviction recorded by the learned Judge convicting the accused-appellant No.1 Nanuji Motiji Thakor for the offence under Section 376 read with Section 34 is required to be quashed and set aside. Accordingly the appeal qua the appellant-accused No.1 is allowed on the aforesaid point only and the order of conviction and sentence passed by the learned Trial Court against the appellant-accused No.1 for the offence under Section 376 read with Section 34 IPC is hereby quashed and set aside.

#. For rest of the offences, learned counsel Shri Dave has not challenged the order of conviction and sentence passed by the Trial Court in view of the fact that the maximum sentence of 1 year R.I. was imposed for rest of the offences and accused-appellant No.1 has already undergone the sentence of more than 4 years.

#. In view of the above discussion, this appeal is dismissed qua accused No.2 Fatuji Bhavansing Thakor. However, it is partly allowed qua the accused No.1 Nanuji Motiji Thakor and the order of conviction and sentence recorded against him for the offences under Section 376 read with Section 34 IPC is quashed and set aside. For rest of the offences the order of conviction and sentence passed by the Trial Judge is not disturbed. However, the maximum sentence was for one year for the rest of the offences, therefore, the accused-appellant No.1 Nanuji Motiji Thakor be released forthwith, if he is not required in any other case.

(B.J.Shethna, J.)

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